BRB No. 03-0195 BLA

CECIL ELKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 09/29/2003
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Cecil Elkins, Amherstdale, West Virginia, *pro se*.

Mary Rich Maloy (Jackson Kelley PLLC), Charleston, West Virginia., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and GABAUER, Administrative Appeals Judges.

Claimant, appears without the assistance of counsel and appeals the Decision and Order (00-BLA-0907) of Administrative Law Judge Richard A. Morgan denying benefits on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1]Claimant's filed his initial claim on February 12, 1982. Director's Exhibit 23. The parties stipulated that claimant had pneumoconiosis arising out of coal mine employment. In a Decision and Order issued on December 15, 1987, Administrative Law Judge Ralph A. Romano denied benefits because claimant failed to establish total respiratory or pulmonary disability. Director=s Exhibit 23. On appeal, the Board affirmed Judge Romano=s Decision and Order denying benefits. *Elkins v Island Creek Coal Co.*, BRB No. 88-0154 BLA (March

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge credited claimant with fourteen and one-half years of coal mine employment. The administrative law judge found that the newly submitted evidence was insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i)-(iv), the element of entitlement previously adjudicated against claimant. Consequently, the administrative law judge found that claimant failed to establish a material change in conditions under 20 C.F.R. §725.309(d).[3] Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge=s denial of benefits. In response, employer argues that the administrative law judge=s denial of benefits is supported by substantial evidence. The Director, Office of Workers= Compensation Programs, filed a letter indicating that he does not intend to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Where a miner files a claim for benefits more than a year after the final denial of a previous claim, the subsequent claim must be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309 (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d) (2000), the administrative law

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26, 1991) (unpublished). Claimant filed a second claim on September 21, 1992, that was denied by Administrative Law Judge Robert S. Amery on the ground that the evidence of record, as a whole, did not support a finding of total disability. Director=s Exhibit 39. The Decision and Order was affirmed by the Board. *Elkins v. Island Creek Coal Co.*, BRB No. 94-2305 BLA (Jan. 30, 1995) (unpublished). On March 18, 1999, claimant filed the current duplicate claim. Director=s Exhibit 1.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are codified at 20 C.F.R. Parts 718, 722, 725 and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The revisions to the regulations at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001. 20 C.F.R. §725.2.

judge must consider all of the new evidence to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev=g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id.*

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge=s finding that claimant has failed to establish a material change in conditions pursuant to Section 725.309(d) (2000). The administrative law judge properly found that none of the newly submitted pulmonary function and blood gas studies of record yielded qualifying results pursuant to Section 718.204(b)(2)(i)-(ii).[4] Decision and Order at 5, 10; Director=s Exhibits 6, 8. The administrative law judge further properly found that the record contains no evidence of cor pulmonale with right sided congestive heart failure and therefore total disability was not established at Section 718.204(b)(2)(iii).

Finally, the administrative law judge found that the medical opinion evidence of record submitted by Drs. Rasmussen, Zaldivar, Fino, Dahhan and Castle failed to establish total disability under Section 718.204(b)(2)(iv). Decision and Order at 11; Director's Exhibits 7, 19; Employer's Exhibit 3, 4, 6, 7. The administrative law judge found that Dr. Rasmussen relied on a non-qualifying pulmonary function study to conclude that claimant was totally disabled from performing his usual coal mine work. Decision and Order at 11. In contrast, the administrative law judge found that the opinions of Drs. Fino, Dahhan and Castle, that claimant retained the physiological capacity, from a respiratory and pulmonary standpoint, to return to his previous coal mine work or a job of comparable demand, well supported by the objective evidence of record. Decision and Order at 11. The administrative law judge acted within his discretion as trier-of-fact in according greater weight to the opinions of Board-certified pulmonologists, Drs. Fino, Dahhan and Castle, as Dr. Rasmussen did not explain how the non-qualifying studies support his opinion. *Id.; Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). Further, the administrative law judge rationally found that the opinion of Dr. Zaldivar, that claimant's disability was caused by cardiac disease and that "there was no pulmonary nor respiratory impairment," failed to support a finding of total disability pursuant to Section 718.204(b)(2)(iv). *Id*. Consequently, we affirm the administrative law judge=s finding that claimant has not established total

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[4]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables in Appendices B and C to 20 C.F.R. Part 718. A Anon-qualifying@ study exceeds those values.

disability under Section 718.204(b)(2)(iv) or by any other means and, thus, has failed to establish a material change in conditions under Section 725.309(d)(2000).[5]

Accordingly, the administrative law judge=s Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge

[5]In his response brief, employer asserts that if the Board vacates the denial of benefits, on remand the administrative law judge must reevaluate the issues of timeliness and responsible operator. On January 15, 2003, the Director, Office of Workers' Compensation Programs (the Director), filed a Motion to Strike the Operator=s Argument That It Should Be Dismissed. By Order issued on March 20, 2003, the Board granted the Director's motion, holding that claimant=s arguments were not properly raised in its response brief, but rather, should have been raised in a cross-appeal. *Elkins v. Island Creek Coal Co.*, BRB No. 03-0195 BLA (March 20, 2003) (unpublished Order). Moreover, because we affirm the administrative law judge=s Decision and Order denying benefits, we need not consider the arguments raised in employer's response brief. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1983).